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Office Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

and

WHEC, INC.,
VETERANS BROADCASTING CO., INC.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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10 February 1960

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Federal Broadcasting System, Inc., the corporate licensee of standard broadcasting station WSAY in Rochester, New York, respectfully petitions this Honorable Court for a writ

of certiorari to review the disposition of this case by the United States Court of Appeals for the District of Columbia Circuit, the final judgment and decision of which was entered by that court of 1 October 1959.

Opinions Below

This case has been before the United States Court of Appeals for the District of Columbia Circuit on three occasions.[1] The final opinion and judgment of the court below has not yet been published in the official reports, but it is reported in 270 F2d at 914.

Grounds For Invoking This Court's Jurisdiction

The judgment of the court below last entered in this case was filed on 1 October 1959. There was no petition for rehearing. Time for filing a petition for writ of certiorari was twice extended by Mr. Justice Black, first on 31 De-

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[1] The first was Appeal No. 12252, Federal Broadcasting System, Inc. v. FCC (1955) 96 U.S. App D.C. 260, 225 F2d 560. In that case Federal appealed the Commission's denial of a hearing on its protest of the grants purportedly authorized by the Commission on 11 March 1953. The court below remanded to the Commission with instructions that Federal be given a hearing. That decision is reprinted in the appendix hereto. WHEC and Veterans at that time asked this Court for a writ of certiorari, but that request was denied, 350 U.S. 923.

The second case was Appeal No. 13235, Federal Broadcasting System, Inc. v. FCC (1956) 99 U.S. App. D.C. 320, 239 F2d 941 in which the courts below affirmed the view that the Commission had authority to allow WHEC and Veterans to continue their share-time operations on Rochester's Channel 10 pending final decision of Federal's protest. Since the issues in that case are now moot, that decision is not here reprinted.

The third case was Appeal No. 15005, Federal Broadcasting System, Inc. v. FCC (1959)—U.S. App. D.C.—, 270 F2d 914 in which the court below upheld the Commission's disposition of Federal's protest. That decision is reprinted in the appendix hereto.

cember 1959, and finally on 21 January 1960 granting until 10 February 1960.

The jurisdiction of this Court is invoked under the Act of June 25, 1958, c. 646, 62 Stat. 928, 28 U.S.C. § 1254.

Questions Presented

The following questions, presented by this petition, are arranged in order of the time on which they arose in this litigation.

First: Whether, at a meeting of the Federal Communications Commission attended by six commissioners, the affirmative vote of three Commissioners is sufficient to authorize the grant of a TV broadcast license when two commissioners vote against such grant, and when the vote is taken during the temporary absence from the room of a sixth Commissioner who had, just before leaving the room in which the meeting was being held for a declared brief absence, expressed clear, and strong opposition to any consideration of the application in question?

Second. Is it arbitrary, capricious, and or unreasonable for the Commission to fail to conclude that the grant of a TV broadcast license would be contrary to the public interest, convenience, or necessity as creating an undesirable concentration of control of media of mass communication when it appears:—

(a) That the applicant owns the only locally published daily newspapers and has more than 91% of the paid circulation in the "principal community";

(b) That the applicant owns one of the five full-time AM stations in the "principal community";

(c) That the applicant owns numerous other media of mass communication in adjacent and other areas, always with the same or similar degree of dominance;

(d) That others who, unlike the applicant in question, did not have a stranglehold on public opinion in

the "principal community" were available to give prompt and highest quality service in the public interest; and,

when it further appears that the only basis on which the Commission seeks to justify the grant in question is by contending that, from some time on 9 March 1953, until the moment of the disputed vote on 11 March 1953, the application in question was deemed by the Commission to be unopposed, even though potential applicants for the license knew that said application had long been opposed and had no reason to assume that the Commission was ready, on 11 March 1953, to dispose of the said application?

OR, if the failure so to find was not error, was the Commission obligated, in view of the above facts, to demonstrate by suitably comprehensive analysis, that it had resolved the foregoing considerations in a manner consistent with the public interest, convenience, or necessity?

Third. Can the Commission, over the objections of one or more commissioners, dispense with the requirement that each commissioner be supplied with all pertinent information respecting every agenda item in advance of the meeting at which action on such items is scheduled when, as a result of dispensing with such requirement, some commissioners are asked to vote on applications respecting which they have been denied advance information, and on which they receive at the meeting only such oral briefing as some staff member deems necessary?

Fourth. Can a valid TV broadcast license be issued when, notwithstanding the requirements of Section 309(a) of the Communications Act, there is no finding made, nor conclusion drawn, with respect to the question of whether it would be in the public interest, convenience, or necessity to grant the application in question?

Fifth. Can the approval of minutes (whose accuracy is disputed) be accomplished by the vote of newly-named com-

missioners who had not even been named to the Commission when the meeting in question was held, and when those commissioners who had attended that meeting had been unable, in nearly five months, to agree on minutes thereof?

Sixth. Can the Commission properly dispose of a Section 309(c) protest without resolving the final and key issue which the Commission itself had framed to govern the hearing on such protest? (The issue framed, and unresolved, by the Commission, was worded thus: "To determine whether, in the light of the facts adduced upon the foregoing issues, the public interest, convenience, or necessity would be served by a grant of the application in question.")

Statutes and Regulations Involved

Statutes

The following Sections of the Communications Act of 1934, as amended, are involved in this appeal:

Section 154(j), 47 USCA 154(j):

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense."

Section 154(l), 47 USCA 154(l):

"(l) All reports of investigations made by the Commission shall be entered of record, and a copy thereof

shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of."

Section 307(a), 47 USCA 307(a):

"(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

Section 309(a), 47 USCA 309(a):

"(a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Section 309(b), 47 USCA (309(b):

"(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues

or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

Section 309(c), 47 USCA 309(c):

"(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission,

after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commissioner shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing."

Regulations

The following Regulations of the Federal Communications Commission are involved in this appeal.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

ADMINISTRATIVE MEMORANDUM NO. 10 (as revised)

SUBJECT: Revision of Commission Agenda Procedure

ISSUED: March 1, 1948; Re-issued November 13, 1950 (4th Revision)

The following procedure is hereby adopted to govern the handling of items to be submitted to the Commission for action either in Commission meeting or by circulation:

I

Commission Meeting Dates

Regular Commission meetings will be held on Wednesdays for non-hearing agendas, and Thursdays for hearing agendas and Executive Session Agendas, unless otherwise directed by the Chairman.

II

Types of Agendas

There shall be 11 agendas each week as follows to contain the items indicated below. The originator of the agenda item shall be responsible for the correctness of the headings thereon, e.g., "For: Common Carrier Agenda" etc., and for coordination with other Bureaus and Offices:

(1) Safety and Special Services	This agenda will contain all items relating to the safety and special services, i.e., those services under the direct jurisdiction of the Safety and Special Radio

Services Bureau, including new rules or changes in rules affecting only those services, but excepting those matters which are required to be placed on the hearing agenda.

(2) Common Carrier — This agenda will contain all items relating to common carrier services, i.e., those services under the direct jurisdiction of the Common Carrier Bureau, including new rules or changes in rules affecting those services but excepting those matters which are required to be placed on the hearing agenda.

(3) General — This agenda will contain all items affecting matters within the jurisdiction of any one or more of the staff officers, i.e., Office of Chief Accountant, Office of Chief Engineer or Office of the General Counsel, Executive Officer and Secretary, and any items which are not appropriate for inclusion in other agendas described in this memorandum.

(4) Television Broadcast — This agenda will contain all items relating to Television Broadcast Matters, and items relating to developmental broadcast and auxiliary services than those delegated to the staff, and rules relating only to those three services, but excepting those matters which are required to be placed on the hearing agenda.

(5) FM Broadcast — This agenda will contain all items relating to FM Broadcast Matters, including these matters which are required to non-commercial educational and facsim-

ile (other than those delegated to the staff) and rules relating only to those services, but excepting those matters which are required to be placed on the hearing agenda.

(6) Standard Broadcast — This agenda will contain all items relating to Standard Broadcast Matters, including new and changed rules relating solely to Standard Broadcast Stations, but excepting those matters which are required to be placed on the hearing agenda.

(7) Broadcast Renewal — This agenda will contain all items relating to Broadcast renewals whether Standard, FM, Television, or any other type not delegated to the staff, and rules relating to renewal matters, but excepting those matters which are required to be placed on the hearing agenda.

(8) Broadcast Assignment and Transfer — This agenda will contain all items relating to assignment of license or transfer of control of Standard, FM or Television stations, including rules relating solely to assignment and transfer matters, but excepting those matters which are required to be placed on the hearing agenda.

(9) Hearing — This agenda will include all matters relating to those proceedings which fall within the purview of Section 0.92 of the Commission's rules involving Common Carrier, Safety and Special, and Broadcast Services in formal hearing proceedings, such as:

(a) Cases on which Initial Decisions have been issued.

(b) Petitions for review by the Commission of rulings upon motions and petitions and other interlocutory matters in formal hearing proceedings which require Commission action.

(c) Petitions for rehearing and reconsideration following Final Decision.

(10) Executive Session — This Agenda shall include the following matters:

(a) Personnel, Fiscal, Budget, and other Management matters. (To be submitted to the Chairman.)

(b) Any other matter which the Commission desires to discuss in executive session.

(11) Classified (as required) — This agenda shall include all items which contain material of a classified nature of a grade confidential or higher. The standards set forth in the internal security regulations shall be used to determine which items are appropriate for inclusion in the classified agenda.

III

Distribution and Handling of Agendas

1. The Minute Clerk will be responsible for preparation and distribution of all agendas and processing and distribution of items appearing thereon, in accordance with instructions issued by the Commission or staff from time to time. All items for regular meetings (Wednesdays and Thursdays) shall be delivered to the Minute Clerk by the

close of business the preceding Wednesday; items received after that day will be held over for the next subsequent meeting, unless authorization is obtained for inclusion on a supplement to the current agenda, as provided below. All items and agendas for regular meetings shall be distributed by the Minute Clerk by the close of business the preceding Friday. This allows Monday and Tuesday for assembly and review of the material. If meetings are scheduled for other days, the deadlines will be adjusted accordingly.

2. No matter may be placed on a supplemental agenda or brought into the meeting for oral discussion by the Commission unless it shall have first been presented to one of the Bureau Heads or Staff Officers who participated therein and he shall have approved, in writing, the placing of such item on the supplemental agenda or the bringing of the matter into the meeting for oral discussion by the Commission. A Bureau Head or Staff Officer giving such approval shall notify the other Bureau Heads or Staff Officers who participated in preparation of or may be affected by the item that he has given such approval. Authorization for special handling of the above will be given by completion of and signature on Form A 81 "Request for Special Handling" for each item when it is sent to the Minute Clerk.

3. Matters passed over in Commission meetings without date will be automatically relisted on the agenda for the fourth week following the date such items were passed over; if an item is passed over to a certain date it will be relisted on that date. If an item is passed over without date for a supplemental memorandum to be prepared by the staff, such item will not be "automatically" relisted until the supplemental memorandum is received, except that to provide periodic review of the item, it will be relisted automatically once every eight weeks until the supplemental memorandum is received or other instructions given. Such supplemental memorandum may be listed on the agenda

without approval of the Bureau Head as required above if they are received in the Minute Branch by the close of business on Monday before the meeting; if such memoranda are received after the close of business on Monday they will be held over for the next subsequent meeting unless authorization of the Bureau Head or Staff Officer is given as above for processing and distribution of such item for the current agenda.

IV

Distribution of Material

1. The Minute Clerk shall distribute the regular agenda material in accordance with approved lists; the Bureau Heads and Staff Officers shall notify the Minute Clerk in writing of any desired changes in names of the staff members under their jurisdiction to whom the regular agendas; notations, agenda items and minutes should be distributed. (Dictators and co-dictators shown on the memoranda and flimsies will be furnished a copy as a matter of routine.) Whenever a staff member desires extra copies (5 or more) of an agenda item for use within the Bureau or Office, requests therefore should be made at the time the item is submitted to the Minute Clerk and should have the approval of the Bureau Head or Staff Officer. All Bureau Heads and Staff Officers are directed to review at this time and as requested hereafter by the Minute Clerk the distribution being made within their Bureaus or Offices to determine that such distribution is proper and is the minimum necessary to carry on the functions of the Bureaus or Offices.

2. The Minute Clerk will process and distribute material for the Executive Session agenda after the Chairman shall have approved the inclusion of such material on the Executive Session Agenda. Distribution of material for this agenda will be made to:

a. All Commissioners
b. Such other persons as the Chairman or the Commission may authorize.

3. The staff shall handle classified material in accordance with current Security Regulations and instructions for the handling of such material.

V

Commission Actions by Circulation

If a particular item must be acted on by the Commission prior to the date of the next regularly scheduled meeting, it should be prepared in stencil form like agenda items, except that two reading carbons are required, and should be accompanied by a "Request for Special Action by Circulation," Form A-82, indicating the reason for circulation, recommendations contained in the item, and signed by the Bureau Head or Staff Officer requesting such circulation. The Minute Clerk shall be responsible for obtaining the Motions Commissioner approval for circulation and the action of the full Commission on the item to be circulated.

VI

Reference Items

1. In order to provide for continuity of action on a particular subject matter and to provide pertinent background information for consideration by the Commission and for use in performing research in the files, staff members preparing an agenda item should include therein under the term "REFERENCE" those flimsies or memoranda previously distributed to or considered by the Commission, if the new item relates thereto and such original items are deemed to be necessary to the Commission's consideration of the current agenda item. Such reference should include mimeograph numbers, if any, item number, type of agenda and date acted on. If the prior item is more than six months old or is not of *sufficient importance* to justify the actual association thereof with the current item, it should not be listed as a reference, but the action taken therein

should be summarized in a few sentences in the narrative discussion, or pertinent portions re-typed in the new memorandum. This will provide the means for searching the history of the matter if needed, but will save many hours of secretarial time in pulling these items from existing files and associating them with the current item, and will reduce the amount of time to be spent by Commissioners and staff reviewing the entire prior item.

2. If, however, it appears uneconomical to retype the prior material, the original item may be listed as a reference, but the Minute Clerk will include a note on the agenda "no extra copies available in the Minute Branch".

3. Insofar as possible, effort should be made to avoid listing as a reference any item which previously appeared on an agenda different from that for which the current item is labeled.

VII

Effective Date of this Procedure

This procedure shall be placed into effect for the meetings beginning December 1, 1950.

WAYNE COY,
Chairman.

Adopted by the Commission:
November 13, 1950

Section 3. 636(a)(2), 47 CFR 3. 636(a)(2):

> "*Multiple ownership.* (a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if:
>
> * * * * * * *
>
> "(2) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or direc-

tor of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience, or necessity for any party, or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band."

"Note 1: The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

"Note 2: In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 per cent or more of the outstanding voting stock."

Section 1. 372, 47 CFR 1. 372:

"*Staff consideration of applications which receive action by the Commission.* (a) Upon acceptance of an application, the complete file is routed to the appropriate Division of the Bureau of Engineering. The application is there reviewed from an engineering standpoint. A draft report containing the recommendations of the Bureau of Engineering is prepared. In cases

where no engineering problems are involved, the report contains no recommendations as to disposition.

"(b) The complete file is then routed to the appropriate Division of the Bureau of Accounting where it is reviewed from an accounting standpoint. A draft report containing the recommendations of the Bureau of Accounting is prepared. In cases where no accounting problems are involved the report contains no recommendations as to disposition.

"(c) The complete file is then routed to the appropriate Division of the Bureau of Law where it is reviewed to determine whether the authorization requested will be in accordance with the Commission's policies, rules and regulations and any other requirements imposed by law. A joint report containing the recommendations of the Bureau of Law and the other Bureaus and any other documents required is prepared and the entire file routed to the Minute Branch of the Bureau of the Secretary which records, mimeographs, and distributes necessary papers to the members of the Commission, heads of Bureaus and other interested staff members, and places the matter on the Commission's agenda. [11 F. R. 177A-415, Sept. 11, 1946, as amended at 14 F. R. 2799, May 27, 1949]."

Statement

Federal Broadcasting System Inc., the petitioner here, was appellant in the court below. Federal is the corporate licensee of WSAY, a standard broadcasting station in Rochester, New York, and was the protestant in the proceedings before the Federal Communications Commission. As protestant, Federal challenged, under procedure authorized under Section 309(c) of the Communications Act, the action purportedly taken by the Commission on 11 March 1953 in authorizing WHEC, Inc., and Veterans Broadcast-

ing Company, Inc., to operate Channel 10 in Rochester, New York on a share-time basis.

In the proceedings before the Commission, WHEC and Veterans enjoyed the position of licensees whose grants were challenged by a protestant who was accusing the Commission itself of error. In the court below, WHEC and Veterans were intervenors, and in 350 U.S. 923, they were the unsuccessful petitioners before this court.

This litigation, which has been in the court below on three occasions, concerns itself with two closely related matters. First, there are the issues which inquire into the validity of the action taken by the Commission on 11 March 1953, and on 5 August 1953. On the first date, the grants in question were said to have been authorized; and, on 5 August 1953, the Commission was said to have approved a set of minutes of the meeting of 11 March 1953. The second, but no less important aspect of this case, questions the manner in which the Commission disposed of Federal's protest. The opinion of the Commission that was appealed to the court below in Appeal No. 15,005, is reprinted in the Supplemental Joint Appendix, 9 copies of which are filed herewith.

The Commission's Meeting of 11 March 1953

One week before the meeting in question, the Commission decided to expedite processing of numerous applications which, since termination of the "freeze" in May 1952, had become uncontested; and, it was decided that as many of those applications as could be prepared for such processing by 11 March 1953 would be presented at that meeting. Oral presentation by the staff was authorized for such applications.

The determination to expedite disposition of applications that had long been unopposed did not relate or refer to the applications for Channel 10 in Rochester which are the only applications here at issue. In framing the questions raised by this petition, reference is made to only one appli-

cation so as to simplify the presentation. Further, to establish that one application was improperly granted necessarily defeats approval of the other one since both applications were made contingent on approval of the other or companion share-time application.

Some time on Monday, 9 March 1953, the Commission authorized "public notice" of the fact that WHEC and Veterans had amended their applications for Channel 10 in Rochester to make them share-time applications.

WHEC, which is owned and controlled (85.7%) by the Gannett enterprises did not, nor did its parent company, disseminate any news in the Rochester area concerning the modification of its application; and, instead, it persisted in an admitted policy of secrecy. Thus, as appeared in one of Gannett's Rochester newspapers on 1 November 1953, the following statements were made:

> "* * * [L]ast February . . . [a] news dispatch about a different type of pool operation in California set off the chain reaction that did away with the obstacles to a new channel for Rochester. Until then, it appeared certain that it would take three to five years for the two stations' conflicting applications to come before the FCC for a decision.
>
> "That news story, placed before WHEC Chief Engineer Bernard C. O'Brien by an alert announcer, set the wheels in motion. Within 15 minutes of its receipt, the station's policy makers were at the meeting out of which came the decision to invite WVET into joint TV operation. At the same time, the same dispatch set off a similar process at WVET.
>
> "For three weeks, executives of both stations met in understandable secrecy in Hotel Seneca, day and night, shaping the policies under which a share-time operation would be possible. WVET's Erving Lyke and WHEC's Gunnar Wiig—now in Pittsburgh—headed the negotiating groups."

The report in the "Democrat Chronicle" does not explain why secrecy was "understandable", but it does go on to say this:

> "First inkling of the revolutionary move to merge two stations' claims came last Mar. 4 when WVET and WHEC amended their conflicting applications for Channel 10, proposing joint occupancy. The move eliminated all conflict, and with it the need for awaiting the claimants' turn—years in the future—to present their cases to the FCC. The agency acted swiftly, granting the stations a license to build seven days later. The settlement was widely copied, and dozens of share-time channels have since been assigned."[2]

The Commission's Administrative Memorandum No. 10, as well as the more formal regulation found in 47 CFR 1.372, required that each commissioner be provided with all pertinent information respecting any application on which action was to be taken on the Friday before the regular Wednesday meeting at which action was scheduled. Pertinent information respecting the applications of WHEC and Veterans was not given to Commissioners Henlock, Merrill, or Walker at any time before the meeting of 11 March 1953. The record does not show whether or not Commissioners Hyde, Sterling, and Bartley were given or obtained special information respecting these applications, but the record does show that those were the three Commissioners responsible for the "quickie" grants purposefully made to WHEC and Veterans on 11 March 1953.

On Wednesday, 11 March 1953, there was an official meeting of the Commission. Six commissioners were present. After disposing of a number of applications which

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[2] This last statement was and is false. According to the Commission, only three such cases were ever authorized, and as of July 1959 there were only two share-time operations in the United States.

had long been unopposed, Commissioners Hyde, Sterling, and Bartley insisted upon taking up the applications of WHEC and Veterans which had, only a few days before, been converted from competitive and mutually exclusive applications to conditionally competitive applications.[3] On the basis that the Commission had never authorized consideration of the Rochester case when it decided, on 4 March 1953, to expedite disposition of applications that had long been unopposed, Commissioner Merrill opposed action and expressed strong disapproval of the proposed vote on the issue. Commissioner (Chairman) Walker agreed. Also at that time, Commissioner Hennock expressed opposition to any consideration of the Rochester application, among others, and having expressed her opposition in clear and strong language, Commissioner Hennock temporarily absented herself from the *room* in which the meeting was held (i.e., she did not leave the *meeting*) for the announced purpose of consulting with the Commission's General Counsel in order to obtain from him, if she could, a ruling on the legality of the proposed consideration of items under "agenda 12" (which included the Rochester applications).

While Commissioner Hennock was temporarily absent from the room, Commissioners Hyde, Sterling, and Bartley insisted on a vote being taken, and the vote was recorded as being three in favor and two against.

In pertinent part Section 154(j) of the Communications Act states:

> ". . . every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. . . ."

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[3] WHEC never made an unqualified application to operate Channel 10 on a share-time basis with Veterans. The most that WHEC ever said was, in substance, that it would accept such a license if the Commission granted it, and that if such a license were granted WHEC's own application for exclusive operation of Channel 10 was to be deemed withdrawn.

Although various versions concerning what actually happened at the meeting of 11 March 1953 were circulated within the Commission for several months, there was not even the pretense of agreement as to the minutes of that meeting until 5 August 1953 when it was claimed that the minutes were approved by a vote of five to one at a meeting attended by six commissioners. However, two of the affirming Commissioners had been named to the Commission after 11 March 1953, had not been present at the meeting in question, and had no personal knowledge regarding what had happened there at. The same three Commissioners who had voted for the grants in question on 11 March 1953 voted, on 5 August 1953, to approve a draft of the minutes which, (altered on the face thereof) said that Commissioner Hennock was "not participating" in the vote on the Rochester applications. The fact that the minutes were altered on their face was noted by counsel for the Committee on Legislative Oversight when former Commissioner Hennock was testifying under oath before that Committee, and is a fact of record in this case.

After learning that a set of minutes had been approved for the meeting of 11 March 1953, Mr. Gordon Brown, President of Federal, asked for and was given two mimeographed copies of minutes of that meeting. In comparing the two copies, he noticed that there were material differences, and he asked an attendant of the Commission to advise him as to which copy was official. Both of those copies were taken from Mr. Brown and he was given a third draft which was the version which had been approved on 5 August 1953. Shortly thereafter, Federal asked the Commission to allow it to examine the various drafts of minutes of the meeting of 11 March 1953 that had circulated in the Commission, and also asked for a copy of Administrative Order No. 10. But, on 19 August 1953, Federal's requests were denied.

Later, when the first appeal was before the court below (Appeal No. 12252), Federal asked, on 20 July 1954, that

the record be perfected and, in particular, that the Commission be required to supply "all memoranda or notes in its possession . . . relating to the procedure and actual voting and participation of the individual commissioners in the said meeting, and any draft copies of minutes circulated by the Secretary as correct during the period between March 11, 1953 and the date of the alleged approval of the said minutes on August 5, 1953." So much of the request as has been hereinbefore quoted was denied by the court below on 29 July 1954.

Federal's Protest

On 17 March 1953, well within the time permitted by Section 309(c), Federal filed a protest to the grants allegedly made to WHEC and Veterans at the Commission's meeting of 11 March 1953. Simultaneously, Federal also filed its own application for Rochester's Channel 10. After having first granted Federal's petition and having set the applications for hearing, the Commission on reconsideration abandoned that ruling, acceded to the request of WHEC and Veterans, and declined to allow Federal's application to remain on file. Final decision of the Commission on this phase of the case was rendered on 30 April 1954, and Federal in good time appealed, and on 28 July 1955 the court below reversed (Appeal No. 12252).

Following this Court's denial of the petition for certiorari sought by WHEC and Veterans, and following a long delay for which no explanation has ever been tendered, the Commission (on 24 February 1956) designated Federal's protest for hearing to commence on 26 March, 1956.

The sixth issue framed by the Commission to govern in the hearing on Federal's protest reads thus: "To determine whether, in the light of the facts adduced upon the foregoing [five] issues, the public interest, convenience, or necessity would be served by granting of the

application [sic] in question." In its decision of 12 March 1958 (released 14 March 1958) the Commission stated, under the subheading "Conclusions," that it would "consider the issues of this proceeding in their numerical order" and, it proceeded, by the use of subheadings, to discuss separately each of the first five issues it had framed. But, the Commission made no reference to the sixth issue and made no findings on, and drew no conclusions with respect to, that issue.[4] At no place in the 68 numbered paragraphs of discussion in the cited decision of the Commission, and in no place in the 18 numbered paragraphs of the conclusions in said decision did the Commission ever refer to the interest of the "primary community" in being free of the monopolistic control of the Gannett interests, and nothing in the Commission's decision indicated how or why anyone could conclude that the grants in question were in the public interest.

In a Per Curiam dated 1 October 1959, the court below upheld (Appeal No. 15005) the Commission's disposition of Federal's protest. In the course of oral argument, however, the court below referred to the fact that the Commission's decision had not alluded to the sixth issue, and inquired of counsel for the Commission with respect for that deficiency. Counsel for the Commission admitted, in open court, that upon the facts in the case it would not have been possible for the Commission to have found that "the public interest, convenience, or necessity would be served by a grant of the application[s] in question" and that the most that the Commission could have found, on the facts in the case, was that it did not appear that the

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[4] Full text of that Decision is to be found commencing at page 110 of the Supplemental Joint Appendix, 9 copies of which accompany this petition. Incidentally, the paragraph number "4" assigned to the first paragraph under the subheading "Conclusions" is a typographical error—it should be numbered as "1".

grants in question were contrary to the public interests, convenience, or necessity.

Jurisdiction of the Court Below

The court below had jurisdiction over this case by virtue of the terms of 47 U.S.C. Section 402(b).

Reasons for Granting the Writ

There are three basic reasons for granting the writ, and unfortunately, they divide the questions here presented in an unequal and non-sequential way. These three reasons are hereinafter separately considered.

Basic Public Policy

The most important reason for granting the writ is the fact that this case involves a serious question as to whether some 500,000 to 1,000,000 persons in and around Rochester, New York will be subjected to the dangers that flow from an undue concentration of control of mass media of communication. In disposing of the concentration of control issue, the Commission resorted to the stratagem of changing the statement of the governing issue and it never concluded that the "grant of the application of WHEC, Inc. would [or would not] result in a concentration of control of the mass media of communication contrary to the public interest". Instead, the Commission studiously avoided such a forthright conclusion and chose to limit its decision to such propositions as: (1) that "the grant of the WHEC television application would [not] result in a concentration of control of television broadcasting [?] in a manner inconsistent with the public interest, convenience and necessity"—(2), that the "record" did not support the conclusion that the grant of WHEC's application would "re-

In *NBC v. FCC* (1943), 319 U.S. 190, 216, this Court said: "The Commission's licensing function cannot be discharged merely by finding that there are no technological objections to the granting of a license."

sult in a concentration of control contrary to the public interest or would create a "communications monopoly" in Rochester" (¶ 6 and 6a), that the grant to WHEC would not violate the "public interest" within the purview of section 3.636(a)(2) of [47 CFR]," a proposition, incidentally, that was never disputed.

In view of the known stranglehold that Gannett now has on public opinion in the Rochester area, and since this is the last Court to which appeal can be made to protect those subject to that power, it is respectfully urged that this Court should review the merits so that it can determine whether or not the interest of approximately one million persons has or has not been afforded the protection promised not only by the Communications Act but also by the fundamental public policy that the public must be assured freedom from dictation as to the elements which formulate public opinion.

It is inappropriate for Federal to endeavor to convince the Court on the merits of this case at this time; and, reluctantly, Federal makes no such effort. Federal's submission is that due to the nature of the charge, and the number of persons involved, this question is of such importance that this Court would be amply justified in reviewing this case on its merits.

In the longer run, there can be few matters of more legitimate concern to a government such as that of the United States than suitable means of preserving the effective right of its citizens to know what is happening on a day-to-day basis, in the world in which they live, and to have such information free of the taint of the interest of the special pleaders. The stations, which are in this case, are applicant for a television broadcast license owns the only two daily newspapers in the "principal community," and is the owner of one of the five radio stations there, and is the owner of many other media of mass communications in adjacent and other areas, there is a question of gravest importance to the public which arises when and if an agency of the Government undertakes to give to such

an organization additional powers to augment the power it already has upon public opinion.

No one denies the fact that the Commission is the agency that should deal with such a question, at least in the first instance. But even if the Commission does endeavor to resolve such conflicts as can properly arise in such a situation—the grasping desire of the molder of public opinion on the one hand and the interest to the Government in keeping the public free from the stifling encroachment of such monopoly on the other—it is most appropriate for this Court to review the resolution of such conflicts because of the vital importance of the basic issue involved.

It is well settled that an agency such as the Commission must respect the guide given to it by the Congress, and in granting a license it must exercise its discretion only when it promotes the public interest, convenience, or necessity; Sections 307(a), 309(a), and 309(b) of the Communications Act. As this Court said in FCC v. Pottsville Broadcasting Co. (1940) 309 U.S. 134, 138:

> "* * * [Although] this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. * * *"

In this case, the Commission did not make use of the "touchstone" which had been given to it by the Congress. See, also NBC v. FCC, *supra* at note 5.

It is not Federal's present duty to justify the charge just made, although it is tempting to endeavor to get such facts before this Court, a temptation which every petitioner faces. But, here Federal endeavors only to demonstrate the importance of the question and its worthiness of review by this Court. And, to this precise purpose Federal respectfully submits that in being allowed to add television to its bag of persuader tools, the Gannett em-

pire has become (if it were not already) the unchallenged master of public opinion in the Rochester area. For the Federal Government to make a grant of such an instrument to such an entity is, without more, suitable justification for this Court to review with care the basis upon which such a gift can have been justified.

Petitioner doubts that many would believe that organizations such as that of Gannett take their true value from the profit that may be made from the sale of newspapers. The precise criterion which gives value to such groups—unchallenged domination in their selected areas—is the very reason which justifies sincere concern on the part of our judiciary which can, after all, serve no more rewarding interest than that of guarding the public against the evils inherent in a controlled public opinion. This petitioner is not suggesting that the Gannett empire is a sinister organization. Its position of peculiar power does not justify condemnation—but neither does it justify augmentation from public resources, certainly not unless and until there is a clear showing that such a result is required by reason of the public interest, convenience, or necessity.

In this entire field, the Commission has failed markedly to exercise the discretion that has been entrusted to it. A reading of the final sentence of subparagraph (2) at 47 C.F.R. 3.636(a), should be sufficient to alert this Court to the reality of the question here under discussion. Thus, in the cited legislation, after promising that it would take account of certain pertinent factors in determining whether concentration of control of mass media of communication was contrary to the public interest, the Commission went on to say that it would

> ". . . in any event consider that there would be such concentration of control contrary to the public interest, convenience, or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television stations, no more than five of which may be in the VHF band."

That which is quoted above is not mere surplusage, but is in point of actual fact the only criterion that the Commission has heretofore considered in such cases—indeed, as the record in this case shows, it was the capstone argument relied upon by the Commission in its disposition here of the issue respecting concentration of control of mass media of communications.[6] Gannett had great power in New York before this case was instituted, and irrespective of the final outcome, Gannett will still have power that outweighs the dollars and cents total of its investment. Federal has no quarrel with that fact. Federal's plea with respect to that fact is, simply, that this Court should review a decision which undertakes to increase Gannett's unchallenged domination by a grant of a public resource.

Conflict with Applicable Decisions of this Court

A second reason for granting the writ is that in disposing of this case the Court of Appeals below decided an important Federal question in a way in conflict with applicable decision of this Court. On this score, Federal refers to the matters covered by questions one, four, and six.

As to question number one, the applicable decision of this Court which was ignored by the decision below is the ruling in United States v. Ballin (1892) 144 U S 1. In that case, at pages 6 and 7, this Court held, quoting with approval from a text then, but not now, well-known, as follows: "When a corporation is composed of a definite number and an integral part of it is required to vote in an election, *a majority of such integral definite part must attend, aliter* there is no elective assembly, but a majority of those

[6] Federal would be glad to argue, if it were appropriate, that the regulation in question borders upon the ridiculous. For, to control television stations in seven principal areas of this country would be to give—indeed, it has already given—power which is not less than staggering and which can never be less than harmful to the real interests of a republic.

present when legally met will bind the rest." (Italics in the original). It follows, from this, that at the meeting of 11 March 1953, four votes were necessary to invoke the authority of the Commission, and since there were only three in favor of the grants in question, those alleged grants are not supported by the lawful authority of the Commission. To resolve this important question, a hearing on the merits is necessary.

As to the fourth and sixth questions, since this Court had held in Colorado-Wyoming Gas Co. v. FPC (1945) 324 US 626, 634, that an agency such as the Commission must make a specific and clear finding on such issues as are required by the statute under which it operates; that requirement had to be, but was not, enforced by the court below. And, although, the court below has on other occasions stated this law with great correctness, [e.g., Clarksburg Publishing Co. v. Federal Communications Commission (1955) 96 US App. DC 211, 225 F2d 511], it did not see fit to apply that rule of law to this case.

Questions this Court Has Not, but Should, Settle

A third but equally important reason for granting the writ is that the court below has decided important Federal questions which have not been, but should be, settled by this Court. The two questions presented by this petition that come under this consideration are the third and fifth.

In view of the fact that many of the most important functions of the United States Government in the economic field are entrusted to commissions, it is of the utmost importance that such commissions be required to exercise their powers in accordance with the law applicable to agencies authorized to exercise power only by acting through a number of delegates. Any practice which sets at naught the importance of one or more commissioners destroys, *pro tanto*, the very reason relied on by Congress in having gone to the trouble to specify that the authority in

question could properly be exercised only upon the guarantees which come from the commission structure, i.e., that specially selected persons (indeed frequently a required basis for their selection is that they shall have diverse views), will be heard out by their fellow commissioners in all politeness and that such competing views shall at least be known and considered by the commissioners who vote and who constitute the lawful majority empowered to act. When a vote is taken behind the back of a commissioner known to be temporarily out of the room in which a commission meeting is being held, the result is to defeat the whole purpose of Congress in having specified that the authority in question be given only into the hands of a commission. The same applies to failing to provide a commissioner with pertinent information in advance of the meeting when he is expected to vote.

Upon the facts which constitute the framework of the third and fifth questions, it seems to this petitioner that the importance of the question amply justifies this Court in granting certiorari so as to hear the issues here involved upon the merits.

The fact pattern involved in the fifth question could be deemed unimportant on the ground that it is unlikely to *again* occur if it were not for the fact that it did in fact occur; for, there is no more reason to believe that it will not occur again—unless this Court speaks on the subject—than it would have been to assume that it would never have occurred in the first place.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Washington 6, D. C.,
Attorney for Petitioner.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15005

FEDERAL BROADCASTING SYSTEM, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WHEC, INC., and
VETERANS BROADCASTING COMPANY, INC., INTERVENORS

On Appeal from Decision and Order of the Federal Communications Commission

Decided October 1, 1959

Before PRETTYMAN, *Chief Judge*, and FAHY and WASHINGTON, *Circuit Judges*.

PER CURIAM: Upon remand to the Commission after our decision in *Federal Broadcasting System, Inc. v. FCC*, 96 U.S. App. D.C. 260, 225 F.2d 560, *cert. denied*, 350 U.S. 923,[1] a full evidentiary hearing was held on Federal's protest, after issues had been duly framed. Findings of fact and conclusions were made, and are included in the Commission's decision and order dismissing the protest and affirming the grant to intervenors of construction permits for new television stations on Channel 10, on a share-time basis, in Rochester, New York. The present appeal is from this decision and order.

We have considered the several procedural contentions raised by appellant and find in them no basis for reversal. As to the merits, the principal contention of appellant is that the grants are inconsistent with the public interest, convenience and necessity in that they result in undue

[1] For a later aspect of the litigation see *Federal Broadcasting System, Inc. v. FCC*, 99 U.S. App. D.C. 320, 239 F.2d 941.

concentration of the media of mass communication in the area affected. The Commission weighed the factors relevant to this contention and resolved the issue in a manner which we think in the circumstances was within its allowable discretion. For this reason, and finding no error in other respects, the decision and order are.

Affirmed.

FEDERAL BROADCASTING SYSTEM, Inc., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

WHEC, Inc., Intervenor,
Veterans Broadcasting Company, Inc., Intervenor.

No. 12252.

Decided July 28, 1955.

Before PRETTYMAN, FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, Circuit Judge.

This case involves a protest against the grant of a television permit (license) for Channel 10 in Rochester, New York, to the intervenors WHEC, Inc. (WHEC) and Veterans Broadcasting Co., Inc. (Veterans). The principal questions raised are whether the Commission's accelerated procedures were valid, and whether it acted properly in dismissing a protest for lack of specificity.

In 1952 WHEC and Veterans filed mutually-exclusive applications for the Channel 10 television license in Rochester. These applications were due to be heard on a competitive basis. In early March of 1953, however, WHEC and Veterans entered into a share-time agreement for the use of Channel 10 and thus resolved the conflict between their applications. On March 4 and 5, 1953, respectively, they amended their applications accordingly. On March 9, 1953, the Commission accepted the amend-

ments for filing and gave public notice of its action. At its next meeting on March 11, 1953, the Commission granted intervenors the Channel 10 television permit for share-time operation.

Federal Broadcasting System, Inc. (Federal), protestant before the Commission and appellant here, is the licensee of standard broadcasting station WSAY in Rochester, New York. At the time when the above-described proceedings in regard to the Rochester Channel 10 television license took place, it was not an applicant for that license. Appellant tells us that it had intended to file an application for the Channel 10 license, but had been prevented from completing its technical data by difficulty in obtaining a suitable antenna site. Six days after the Commission's grant to the intervenors, Federal filed its application for Channel 10. Simultaneously it filed a protest, under Section 309(c) of the Federal Communications Act, 47 U.S.C.A. § 309(c), against the grant to intervenors.

Acting on Federal's protest the Commission suspended the intervenors' permit and set Federal's protest for hearing on issues to be framed by subsequent order. The intervenors objected to the protest on the ground that Federal was not a "party in interest" and had not specified "with particularity the facts, matters and things relied upon." On July 27, 1953, the Commission reversed itself and dismissed the protest on the latter ground. It also returned Federal's application for a television license on Channel 10.

On August 18, 1953, Federal filed a petition for reconsideration, relying on newly-found facts relative to the alleged invalidity of the Commission proceedings of March 11, 1953.

On May 3, 1954, Federal's position for reconsideration was denied both on the ground that the Commission could not act on facts presented after the expiration of the 30-day period allowed for filing a protest under 47 U.S.C.A. § 309(c), and that the facts set forth in Federal's petition for reconsideration, if considered on the merits, did not constitute a reason for reinstating Federal's protest. This appeal followed.

I

The primary issue before us is, of course, whether the Commission erred in its treatment of Federal's protest against the grant made.

Section 309(e), under which the protest was filed, was added to the Act by the 1952 revisions. It was an expression of Congressional desire to guarantee interested parties an opportunity to be heard where Commission action was taken without a prior opportunity for voicing opposition. This was an innovation. However, in thus opening the door to protestants, Congress required that the protest "*shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally.*" (Italics added.) 47 U.S.C.A. § 309(e). It was this requirement that the Commission held was not satisfied by Federal's protest.[1]

It is clear from a reading of the statute and its history that Congress sought to require one protesting a unilateral grant of a license by the Commission to show in some detail the factual basis of his grievances.[2] Generalized objections are obviously insufficient under the statute without some specification of events and circumstances. But neither are we to measure the requirement of Section 309(e) by the technicalities of pleading formerly applicable in civil litigation. What is required is merely an articulated statement of some fact or situation[3] which would tend to show, if established at a hearing, that the grant of the

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[1] The Commission held, and we think properly, that Federal was a "party in interest" entitled to file a protest.

[2] "Provisions also are included which are designed to guarantee that any hearings held before the Commission upon any application will be conducted upon the basis of issues clearly defined so that the Commission will act as an arbiter." S.Rep. No. 44, 82d Cong., 1st Sess., p. 8 (1951).

[3] Compare Christianson v. Gaines, 1949, 85 U.S.App.D.C. 15, 174 F.2d 534; Shotkin v. General Electric Co., 10 Cir., 1948, 171 F.2d 236; Fleming v. Dierks Lumber & Coal Co., D.C.W.D.Ark.1941, 39 F.Supp. 237.

license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding.

Read in that light it seems clear to us that appellant's protest raises at least one issue with sufficient particularity to require that a hearing on the protest be granted. That is the issue of threatened monopoly control of mass media of communications in the Rochester area. The protest in that regard avers that the intervenor WHEC is a subsidiary of the Gannett Newspaper chain which has a monopoly of the daily newspapers in the City of Rochester, owns other standard broadcasting stations both in Rochester and elsewhere and controls numerous newspapers outside Rochester. A list of Gannett enterprises is set forth as part of the protest, showing the extent of the Gannett radio and newspaper chain in upstate New York, which includes the Rochester area.[1] Appellant further asserts that the Gannett newspapers, "obviously" because of their ownership of Station WHEC, have treated appellant's Station WSAY unfairly in regard to publicity coverage of the latter's radio programs and thus have caused it financial loss beyond what would have been the result of ordinary competition between the two radio stations. Federal also stated that the newspaper chain operating WHEC engages in broadcasting "as a business activity secondary to their principal business, the publishing of newspapers."

In our view, these allegations clearly "specify with particularity the facts, matters, and things relied upon," and the Commission erred in holding the contrary. Nor can it be said that the issue so raised is frivolous or immaterial. On the contrary, this court's recent decision in Clarksburg

[1] This list actually is Appendix A to appellant's reply to the motion to strike the protest made by intervenors. This document was received by the Commission April 1, 1953, within the 30-day protest period set by Section 309(c), and running from March 12, 1953. Factual matter contained in such a document can clearly be considered as part of the protest in evaluating compliance of the protest with the particularity requirement of the same section.

Publishing Co. v. Federal Communications Commission, 1955, 96 U.S.App.D.C. 211, 225 F.2d 511, shows its importance. And the fact that Federal raises the issue as part of its effort to show its own comparative superiority does not diminish the public interest involved in the matter.

Federal's protest went further than to raise the issue just mentioned. It went on to say that (1) Federal was surprised by the sudden action of the Commission in granting the WHEC and Veterans license; it could not have anticipated such action because up to March 4, 1953, the application of the grantees had been mutually exclusive; in consequence, the Commission should waive its rules with regard to the filing of applications prior to action by the Commission, and allow Federal's application to be filed as an application mutually exclusive with that of WHEC and Veterans. Federal alleges that the Commission acted too speedily in making the protested grant and acted under internal proceedings unknown to Federal or to the public and without reasonable notice of the change in the status of the applications of WHEC and Veterans. (2) The operation of both stations through a joint transmitting plant involves legal and practical questions which were never fully considered by the Commission. Use of a television station by one operator gives, Federal says, superior service. Federal also predicts that intervenor WHEC will buy out the interest of the other intervenor Veterans in the proposed joint television station, though furnishing no facts to sustain this allegation. (3) Federal "doubts" that the financial qualifications of Veterans could withstand the careful scrutiny to which they would be subjected at a competitive hearing, and asserts that "the commercial policies by which they conduct [standard broadcasting station] WVET accord neither with accepted practice nor the commitments made as an applicant"; that Veterans has had "financial difficulties in which one of the Rochester banks became involved to the extent of $100,000 or more" and that the bank brought pressure on merchants to advertise with WVET; and that other "commercial tactics of WVET have been of such a character that petitioner prefers to operate unprofitably rather than to degrade its

programs through adoption of such questionable practices."[3]

We need not here consider whether each of these additional allegations, taken separately, is stated with sufficient particularity. For, as we said in Clarksburg, once a protestant as here has shown sufficient grounds to require the holding of the hearing prescribed by Section 309(c) of the Act, the Commission is free to consider any issue bearing on the qualifications of the licensee or the required finding of public interest, convenience and necessity; it is not limited to issues raised by the protestant. In the present case the Commission could not conclude its hearing until it has built up a record sufficient to support its final conclusions. The speed with which it made its grant to the intervenors seems to us to require that it now act with particular care in its re-examination of the matter. That re-examination should include an appraisal of the arrangement for joint operation by the intervenors, with reference not only to its effect on programming but also to *the circumstances surrounding the amendment of the original applications and the initiation of the joint project.* See Clarksburg, supra.

II

For the reasons given, we think that a broad reopening of the case is called for by appellant's protest. The question remains: at the forthcoming proceeding, is the Commission bound to give appellant a comparative hearing on its application? Appellant asks us to answer this question in the affirmative.

It is clear, of course, that the protest procedure is not, as such, designed to develop comparative considerations. It is one designed to vindicate the public interest through an examination of alleged defects in the outstanding grant. Here, if the Commission ultimately sets aside the grant to the intervenors, after holding a hearing on the protest, it will be open to appellant to file an application which will be entitled to consideration along with any

[3] These last two allegations appear in Federal's reply to the motion to strike its protest. See note 1, supra.

other for the same channel. But appellant goes farther: it argues that it is presently entitled to a comparative hearing. Its position, in essence, is that the Commission's grant of a license to the intervenors is completely lacking in validity or effect: in its view, the channel is still open for assignment.

Appellant first contends that the Commission's grant to intervenors is invalid, as not being based on the votes of a majority of the Commission. The minute of the Commission's March 11 meeting shows that Commissioner Hennock objected to the entire procedure there followed, because she felt that it failed to safeguard the interests of the public and of other prospective bona fide applicants who were given no notice of the sudden acceleration of the Commission's normal processing activities. (J.A. 134-5) When the Rochester applications were reached, Commissioner Merrill asked that they be passed over for his further study. The majority of the Commissioners did not accede to his request, although Commissioner Merrill stated that such a request had in the past always been respected. When the vote was taken on the grant of a license to the intervenors three Commissioners voted in favor of the application, two Commissioners voted to pass over and Commissioner Hennock did not participate. At a meeting of the Commission held on the following day a motion was made to reconsider the grant of the Rochester license application but was defeated.*

Appellant here renews its argument before the Commission that we should construe the vote taken on the intervenors' applications for a license at the March 11, 1953, meeting of the Commission as a tie vote, counting Commissioner Hennock's absence as a negative vote in view of her dissent. However, the Commission's minutes, duly approved by it and now urged upon us as valid by the Commission's counsel, shows a vote of three Commissioners in favor of the application, with two Commissioners op-

* Loyola excused its delay in presenting these facts as part of its original protest by its inability to secure, prior to August 1953, a copy of the minutes of the Commission's March 11 meeting.

posed out of a total of five Commissioners voting, one Commissioner being absent when the vote on the Rochester application was taken. Nothing in law or fact authorizes us to reach any other conclusion than that the action in question was taken by majority vote of the Commissioners present and voting.

Secondly, appellant complains of the procedures by which the Rochester television applications were brought before the Commission for action on March 11, 1953. It cannot point to any specific provision of the Commission's rules which was contravened. On the contrary, it concedes that Section 1.382(b) of the Rules required that an application, to be considered as mutually exclusive with applications already on file, must be filed not later than the close of business on the day preceding the day on which the Commission takes action with respect to applications previously filed. Appellant's application was not so filed. Further, there was no rule in effect barring the Commission from promptly considering applications which had become ripe for action, or compelling their consideration in any particular order.[7] But appellant argues that the Commission acted with undue speed, under procedures unknown to Federal or the public, and without reasonable notice of the change in status of the pending applications of WHEC and Veterans.

Were the procedural changes adopted by the Commission arbitrary in the sense that they cumulatively amounted to a violation of due process? To answer this question requires some consideration of the background against which the Commission's action was taken. Because of the overwhelming burden of processing and hearing contested television license applications the Commission, in May 1952, had temporarily discontinued the processing of these applications and had continued processing only those cases where a single applicant sought a license for a particular television channel. Since May 1952 numerous additional applications had become uncontested and, to dispose

[7] In fact, the Commission had already decided to take up these applications at its next meeting.

of them as speedily as possible, the Commission decided on March 4, 1953, to place such applications on its agenda for March 11, 1953. Including the Rochester applications, 48 applications in this class were slated for action on March 11. The Commission also decided to proceed on March 11 without the written presentation normally foreseen by its rules[2] and to act on oral staff statements as to the qualifications of the applicants. Since the Commission considered that these applications did not require a comparative hearing any more than applications at all times uncontested, it decided on March 4, 1953, to make a dent in this part of its backlog by the procedure outlined.

Insofar as the choice of this method involved internal procedural changes the Commission under Section 4(i) and Section 4(j) of the Act[3] had the power to issue such orders as were necessary in the exercise of its duties and to conduct its business in such manner as would best serve both proper dispatch of business and the ends of justice. We cannot say that the Commission's deviation from its usual procedure, and grants made thereunder, exceeded its powers. Cf. Norris & Hirshberg v. Securities and Exchange Commission, 1947, 82 U.S.App.D.C. 32, 163 F.2d 689; Morgan v. United States, 1938, 304 U.S. 1, 18, 58 S.Ct. 773, 999, 82 L.Ed. 1129; Bethlehem Steel Co. v. N. L. R. B., 1941, 74 App.D.C. 52, 120 F.2d 641.

After a short period of experimentation and consideration, this additional procedure for dealing with uncontested

[2] The Commission's rule, 47 C.F.R. § 1.372 (1953), obviously contemplates, though it does not expressly prescribe, the preparation of such reports *in writing*. Appellant here complains, *inter alia*, of the omission of written reports.

[3] 47 U.S.C.A. § 154(i) and (j), providing in relevant part as follows:

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *"

applications was formally approved by the Commission and the step from *ad hoc* action to general rule making taken.[10] Certainly such a matter was primarily within the Commission's "informed discretion." Securities and Exchange Commission v. Chenery Corp., 1947, 332 U.S. 194, 203, 67 S.Ct. 1575, 1760, 91 L.Ed. 1995, and is not open to the broad challenge made by appellant here.

But to recognize the primary role of the Commission in governing its own procedures does not mean that we are oblivious of the dangers of accelerated procedures which might sacrifice the careful performance of the Commission's substantive tasks to mere speed. See Clarksburg, supra. Speed of Commission action may in some cases point to a failure to make those essential findings which the agency must make under Section 309(a) of the Act,[11] before it grants a requested license. And any perversion of the Commission's administrative processes for an improper purpose would call for administrative relief or, if that is not granted, for judicial correction presumably injunctive in nature. But no such situation is here alleged. In this court appellant states that it had intended to file an application for a television license but had been prevented from completing its technical data because of difficulty in obtaining a suitable antenna site. The Commission was hardly compelled to wait for the resolution of this obstacle, even assuming that it knew of it.[12]

The cases relied on by appellant do not lead to a different conclusion. United States ex rel. Knauff v. McGrath, 2 Cir., 1950, 184 F.2d 839, dismissed as moot, Knauff

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[10] See FCC Order 53-627 amending subparagraph (m) of footnote 10 of Section 1.371, dated May 25, 1953, 18 Fed.Reg. 3068, as further amended by FCC Order 53-889, July 17, 1953, 18 Fed. Reg. 4378, and FCC Order 54-1305, Oct. 21, 1954, 19 Fed.Reg. 6881, substituting therefor § 1.378, 47 C.F.R. § 1.378.

[11] 47 U.S.C.A. § 309(a).

[12] In 1948, appellant's station WSAY wired the Commission protesting the refusal of station WHAM to share its television transmission site with WSAY. The matter was not pressed, and was certainly stale by 1953.

v. McGrath, 1951, 340 U.S. 940, 71 S.Ct. 504, 95 L.Ed. 678, involved an administrative denial of a stay of deportation. It was deemed proven for purposes of decision on appeal that in all instances without exception such a stay was granted pending congressional action, once a bill had been offered. A judicial stay was, therefore, granted by the court. But no such situation is involved here. Here the exceptional treatment accorded to the Rochester applications was proposed to be granted to 47 other television applications, in an effort by the Commission to speed up the disposition of applications where a contest had ceased to exist. The Commission's approach to the problem of disposing of this backlog of uncontested television applications certainly cannot be considered as equivalent to a single arbitrary exception in the handling of pending applications. The Commission is not bound to adhere to a procedure just because it was once adopted. Cf. Churchill Tabernacle v. Federal Communications Commission, 1947, 81 U.S.App.D.C. 411, 160 F.2d 244.

United Detroit Theatres Corp. v. Federal Communications Commission, 1949, 85 U.S.App.D.C. 239, 178 F.2d 700, is even less applicable. It holds that a single application may not be arbitrarily held up. We found in that case that the need for certain investigations under Commission policies required that consideration of the application be postponed. In the instant case appellant had no application pending which was held up arbitrarily. The Rochester applications were processed with dispatch. Perhaps some other applicant could argue that taking up the Rochester applications ahead of others on the list caused prejudice to him. But appellant—not such an applicant—is not in a position to rely on this argument.

Nor does appellant's challenge to the Commission's procedure fare better insofar as it relies on Section 3(a) of the Administrative Procedure Act.[13] The only penalty pro-

[13] 5 U.S.C.A. § 1002(a):

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority

vided in that section is that no person shall be required to resort to any agency procedure not duly published in the Federal Register. Appellant was not compelled to resort to procedure not published.

We conclude, therefore, that the Commission's proceedings—whether or not subject to criticism were not so infirm as to require departure from the well-established rule that a late-filing applicant is not entitled to a comparative hearing. KFAB Broadcasting Co. v. Federal Communications Commission, 1949, 85 U.S.App.D.C. 160, 177 F.2d 40; Telegraph Herald Co. v. Federal Radio Commission, 1933, 62 App.D.C. 240, 66 F.2d 220; cf. Yankee Network v. Federal Communications Commission, 1939, 71 App.D.C. 11, 107 F.2d 212.[14]

III

Appellant also urges on us as illegal the rejection of the petition for reconsideration on the ground that the Commission could not properly consider as part of a protest newly-discovered matter first set forth after the end

and the established places at which, and methods whereby, the public may secure information or make submittals, or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

[14] The Commission's practice conforms to this rule. T. E. Allen & Sons, Inc., 9 Pike & Fischer RR 197 (1953). Appellant relies on Western Air Lines, Inc., v. Civil Aeronautics Board, 9 Cir., 1952, 196 F.2d 933, and United Air Lines v. Civil Aeronautics Board, 7 Cir., 1952, 198 F.2d 100. But these cases involved proceedings for the suspension of one air carrier and substitution of another on an existing route, a situation which has no application to the instant appeal.

of the 30 day period for filing a protest. Appellant claims that to the extent that the two applicable sections of the Federal Communications Act are in conflict, Section 405[1] supersedes the shorter limitation contained in Section 309(c), insofar as rehearings are concerned. We need not resolve this alleged conflict, since the Commission's Order of May 3, 1954, denying reconsideration of Federal's protest, in fact gave full consideration to the new matter alleged by appellant. The question is thus moot.

Reversed and remanded for further proceedings consistent with this opinion.

(9109-0)

[1] 47 U.S.C.A. § 405.